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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,
Petitioners,

v.

ARTIST M., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), provides that, for States to be eligible to receive federal foster care assistance funds, they "shall have a plan approved by the Secretary [of Health and Human Services] which * * * provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." The question presented in this case is as follows:

Whether Section 671(a)(15) creates a right to the exercise of "reasonable efforts" that may be effectuated in federal court under 42 U.S.C. § 1983.

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and continuing interest in the issue presented here: when federal spending statutes create rights that are enforce-

able against state and local governments under 42 U.S.C. § 1983.

This case concerns Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), which makes it a condition for the receipt of federal foster care assistance payments that States adopt plans providing for the exercise of "reasonable efforts" to prevent the removal of children from their homes. The courts below held that this provision confers a right upon the affected children, cognizable in federal court under Section 1983, to demand the exercise of such "reasonable efforts."

Amici and their members will be directly affected by the Court's decision about the scope of Section 671(a)(15). *Amici* also have a broader interest in the law governing Section 1983 actions that challenge the administration of federal spending programs. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT OF THE CASE

1. In 1980 Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (the "AAA" or the "Act"), P.L. 96-272, codified at 42 U.S.C. §§ 620-628, 670-676, which amended the Social Security Act by adding a new Title IV-E to assist States in providing foster care to neglected and abused children. Under the cooperative federal-state venture established by the Act, States that have filed required plans approved by the Secretary of Health and Human Services (the "Secretary") may receive federal matching funds for certain foster care maintenance payments. Section 672(a) provides that a State may make such payments only to chil-

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[1] The parties' letters of consent pursuant to Rule 37.3 of the Rules of this Court have been filed with the Clerk of the Court.

dren "remov[ed] from the home of a relative" pursuant to voluntary agreement or a court order.

The central issues in this case involve Section 671, which specifies the requirements that a state plan must meet to qualify a State for participation in the federal-state program. That section provides in relevant part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> * * * *
>
> (15) * * * provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15).

2. Petitioner Sue Suter is the administrator of a state agency, the Illinois Department of Children and Family Services ("DCFS"), that is responsible for investigating complaints regarding neglected and abused children and for providing, where appropriate, protective services, including foster care, to such children. Pet. App. 2a, 33a. The responsibilities accorded the DCFS by state law are immense. In fiscal year 1990 the DCFS received 255,887 calls on its "State Central Register" hotline reporting possible cases of abuse. Illinois Department of Children and Family Services, Executive Summary 1 (July 1990). In Cook County alone it was called upon to investigate 26,604 cases of alleged abuse and neglect that year. *Id.* at 6.

On December 14, 1988, respondents initiated a class action suit under 42 U.S.C. § 1983 as well as directly under the AAA against petitioner in her official capacity,[2]

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[2] Petitioners also include Suter's predecessors, Jess McDonald and Gordon Johnson, as well as Gary T. Morgan, DCFS Guardianship Administrator.

seeking declaratory and injunctive relief. Respondents alleged that the DCFS violated the "reasonable efforts" provision of Section 671(a)(15) of the Act by failing to assign caseworkers to children under its care in a timely manner. Pet. App. 32a-33a. The United States District Court for the Northern District of Illinois certified two classes. The first (class A) consisted both of Cook County children in the direct custody of the DCFS and of children who remained at home under DCFS supervision. The second (class B) included only those children directly in DCFS custody. Pet. App. 32a.

Following class certification, petitioners moved for dismissal of respondents' complaint on the grounds, *inter alia*, that the "reasonable efforts" provision of Section 671(a)(15) does not create rights that are enforceable under Section 1983. Similarly, petitioners argued that there is no implied right of action directly under the AAA. Finally, petitioners sought dismissal of the complaint as to Class A, which includes children not in foster care and for whose care the State receives no funds under the AAA. Pet. App. 34a.

In a decision rendered on November 21, 1989, the district court rejected each of these arguments. The court reasoned that because other courts had held that other provisions of the AAA create enforceable rights, Section 671(a)(15) likewise creates such rights. Pet. App. 42a. Similarly, the court concluded that because this Court had held in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), that the word "reasonable" in the context of a statute permitting a "reasonable allowance" for utility charges to be included in a tenant's rent was not too "vague and amorphous" to be enforceable under Section 1983, the term "reasonable efforts" is sufficiently precise to be enforceable. Pet. App. 43a. Finally, the court held that there exists an implied

right of action directly under the AAA for violation of Section 671(a)(15)'s requirements.[3] Pet. App. 35a-41a.

Having determined that the plaintiffs had stated a cause of action, on March 2, 1990, the court issued a preliminary injunction requiring the DCFS to assign caseworkers to each of the individuals in the plaintiff classes "within three working days." Pet. App. 55a. The court's ruling made no distinction between children in Classes A and B even though Class A includes children who have not been removed from the home pursuant to section 672. *Ibid.*

A divided panel of the Court of Appeals for the Seventh Circuit affirmed. Applying the three-part test articulated in *Wilder* v. *Virginia Hospital Association*, 110 S. Ct. 2510 (1990), the court held that Section 671(a)(15) creates an enforceable right under Section 1983. Pet. App. 10a. The court reasoned that Section 671(a)(15) "imposes a binding obligation on the state" that is intended "to benefit children such as those in the plaintiff classes." Pet. App. 10a. The court also held that the term "reasonable efforts" is not too vague and amorphous to be judicially enforceable. *Id.* at 11a. Because the court found no evidence that Congress intended to foreclose a remedy under Section 1983, the court affirmed the district court's holding that Section 671(a)(15) is enforceable in an action under Section 1983.[4] Pet. App. 13a-14a.

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[3] The court granted petitioners' motion to dismiss as to respondents' constitutional due process claim, Pet. App. 47a-48a, a decision not presently before this Court. *Id.* at 1a n.2.

[4] The court of appeals also affirmed the district court's judgment that the AAA implicitly authorizes a private right of action (Pet. App. 14a) and that children living at home could maintain an action under the AAA, explaining that "the language of the statute does not reveal an intention by Congress to limit its terms only to children actually in foster care outside the home."

Judge Manion dissented. Pet. App. 20a. Suggesting that "*Wilder's* holding relates to a statutory provision and facts discernably different from that of the present situation," Judge Manion concluded that this case should be decided under "the more applicable legal standards and reasoning of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981)." Pet. App. 21a. Judge Manion believed that because the "reasonable efforts provision "creates no specific mandate" and "relates to the overall reasonableness of every aspect of the foster care program," there "is nothing for the court to determine as being reasonable or unreasonable." *Id.* at 24a. Finally, Judge Manion reasoned that because of the open-ended character of the term "reasonable efforts," the provision fails to create an enforceable right under *Pennhurst* because its language does not "unambiguously notify Illinois of the conditions it must meet in order to receive federal help." Pet. App. 26a.

SUMMARY OF ARGUMENT

I. As an initial matter, the court of appeals went astray in determining the existence of a "right" through application of the three-part test set out in *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989). That test is properly used when the statute at issue imposes unconditional duties directly on a unit of government. But it is not, at least as a general matter, appropriately applied when federal-state funding statutes are asserted to create rights within the meaning of 42 U.S.C. § 1983, because such funding provisions are "in the nature of a contract." *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Spending programs like the AAA thus are, in essence, federal-state contracts in which the parties to the agreement have undertaken to assist third-party beneficiaries. And it is most unlikely that the drafters of Section 1983 would

have understood the terms of such a contract to create rights enforceable by the third party beneficiaries. To the contrary, it was generally accepted at the time of the enactment of Section 1983's predecessor that—with the exception of contracts where the third-party itself performed consideration—such beneficiaries could not sue on contracts.

Having said this, of course, we recognize that the Court applied the *Golden State* test to hold that the spending provision at issue in *Wilder* v. *Virginia Hospital Association*, 110 S. Ct. 2510 (1990), created rights under Section 1983. But that program differed materially from a typical spending statute of the sort at issue here. The statute invoked in *Wilder* funneled federal funds directly to the plaintiffs in return for their provision of services; viewed in contractual terms, the *Wilder* plaintiffs had performed consideration that entitled them to federal moneys. And that is precisely the sort of three-party arrangement in which, at the time of Section 1983's enactment, the third-party beneficiary would have been permitted to seek enforcement of the contract's terms.

II. If Section 671(a)(15) does create rights, by its plain terms it guarantees only that a State "shall have a plan" for the disbursement of federal funds that describes the measures the State will take to minimize foster care. Nothing in the statute itself requires that States engage in any specific substantive measures. This understanding of the statute's scope is confirmed by the implementing regulations, which provide that States are in compliance with the reasonable efforts requirement when they have plans that describe the services provided. And in this regard, Section 671(a)(15) stands in sharp contrast to the statute at issue in *Wilder*, which imposed express, substantive requirements on participating States.

III. Finally, Section 671(a)(15)—even if it confers a right to the *exercise* of reasonable efforts—is too vague and amorphous to be judicially enforceable under Section 1983. A judicial determination of the reasonableness of the State's efforts inevitably would necessitate a review of the State's decisions regarding enforcement policy and the allocation of resources. In closely related contexts, the Court has indicated that such inquiries are outside the competence of the judiciary. See *Heckler* v. *Chaney*, 470 U.S. 821 (1985). And again, the statute here differs dramatically from the one at issue in *Wilder*, which was deemed enforceable because it provided objective benchmarks against which to gauge the State's performance.

ARGUMENT

SECTION 671(a)(15) OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980 DOES NOT CREATE RIGHTS THAT ARE ENFORCEABLE UNDER 42 U.S.C. § 1983

It is common ground between the parties in this case that not all violations of federal law are cognizable under 42 U.S.C. § 1983. Instead, as the Court has emphasized repeatedly, "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989). See *Dennis* v. *Higgins*, 111 S. Ct. 865, 871 (1991); *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2517 (1990); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981). The dispositive issue here, then, is whether Section 471(a)(15) of the AAA, 42 U.S.C. § 671(a)(15), "creates a 'federal right' that is enforceable under § 1983." *Wilder*, 110 S. Ct. at 2517. Although it purported to ask that question, in our view the court below went fundamentally astray both in identifying the considerations relevant to its answer and in conducting its analysis of those considerations.

I. FEDERAL SPENDING PROGRAMS GENERALLY DO NOT CREATE RIGHTS THAT ARE ENFORCEABLE BY THE PRIVATE BENEFICIARIES OF THOSE PROGRAMS

1. The court of appeals assumed (see Pet. App. 10a), without analysis, that the question whether Section 671(a)(15) of the AAA creates rights within the meaning of Section 1983 should be answered by looking to the three considerations identified in *Dennis*, *Golden State*, and *Wilder*: whether the statute was designed to benefit the putative plaintiffs, imposes binding obligations on the defendant governmental unit, and is not " 'too vague and amorphous' [as] to be 'beyond the competence of the judiciary to enforce.' " *Golden State*, 110 S. Ct. at 448 (quoting *Wright* v. *Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 431-432 (1987)). See *Dennis*, 111 S. Ct. at 871; *Wilder*, 110 S. Ct. at 2517. The *Golden State* test, however, is not the appropriate one to apply here.

When a statute (or constitutional provision) imposes unconditional duties directly on a unit of government, as was true in *Dennis* and *Golden State*, we agree—as we argued in *Golden State* (see Br. for National League of Cities, *et al.*, No. 88-840, at 14-19)—that application of the three-part test is appropriate. That approach plainly accords with the intent of Congress when it enacted Section 1983 in 1871. The legislative debates did not address the sorts of statutes that were thought to create "rights."[5] The term, however, had an accepted meaning at the time: rights were understood to embrace those things that could " 'be lawfully claimed' " (Cong. Globe, 42d Cong., 1st Sess. 313 (1871) (remarks of Rep. Burchard) (citation omitted)), encompassing "an en-

[5] That is hardly surprising, since deprivations of rights secured by law were not made actionable under Section 1983's predecessor until 1874. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608-609 (1979).

forceable claim or title to any subject matter whatever." W. Anderson, *A Dictionary of Law* 905 (1893). While there is an element of circularity to this definition—a right was an enforceable claim, while the enforceability of a claim turned on whether it asserted a right—rights plainly were understood to flow from those laws that imposed direct and unconditional proscriptions for the benefit of particular individuals. The courts of the time in fact recognized common law rights of action only under such statutes. See, *e.g.*, *Hayes* v. *Michigan Central R.R. Co.*, 111 U.S. 228, 240 (1884); *Pollard* v. *Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874); T. Cooley, *Law of Torts* 790 (2d ed. 1888).

At the same time, the history suggests that the *Golden State* test should not, at least as a general matter, govern the identification of rights under what the Court has termed "a mere federal-state funding statute." *Pennhurst*, 451 U.S. at 18. As the Court has explained, federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 17. In particular, a spending program such as the AAA is, in essence, a federal-state contract in which the parties to the agreement have undertaken to assist third-party beneficiaries, which in this case include respondents. And it is most unlikely that the drafters of Section 1983 would have understood the terms of such a contract to create rights enforceable by the third party beneficiaries.

To the contrary, at the time of the enactment of Section 1983 it was generally accepted that—with the exception of contracts where the beneficiary was owed a preexisting duty by the promisee, usually as the result of performance amounting to consideration by the benefici-

ary—third party beneficiaries could not sue on contracts. As Story explained long before the enactment of Section 1983's predecessor:

> It is now well settled, as a general rule, though the early cases are quite contradictory on this point, that in cases of simple contract, if one person makes a promise to another for the benefit of a third, although no consideration move from such third person, it is binding * * *. The principal difficulty seems to be in determining in which party the right of action resides. *As between the plaintiff and defendant, there must be a privity of contract*, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff.

W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82-83 (1844, reprint ed. 1972) (emphasis added) (footnotes omitted).

This proposition was uniformly accepted at the time. Writing almost contemporaneously with the enactment of Section 1983's predecessor, for example, Langdell concluded that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise." C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). Langdell also observed "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise," adding that this "proposition is so plain upon its face that it is difficult to make it plainer by argument." *Ibid.*[6] Not surprisingly, then, this Court

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[6] This proposition was widely acknowledged. See, *e.g.*, J. Clark Hare, *The Law of Contracts* 193 (1887) ("It is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to

recognized at the time "the general rule that privity of contract is required" to support an action for enforcement. *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124-125 (1878).[7]

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the parties, and cannot be enforced by third persons."); 1 F. Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party with whom a contract is made is the proper plaintiff in a suit upon such a contract, although the beneficial interest is in other persons."); *id.* at 426-427 (noting exceptions to rule but affirming that action cannot be maintained "where the contract is made by a sealed instrument"); 1 W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" in the United States is to hold "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); 2 F. Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"); *id.* at 156-157, 162-170. Indeed, it appears that the rights of donee beneficiaries were not established in the United States until well into the twentieth century. See K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990).

A similar rule was recognized under English common law in the nineteenth century. Although earlier cases had suggested that a child could sue as a beneficiary under a contract made on its behalf by a parent (see A. Farnsworth, *Contracts* § 10.2 at 712 (1982)), that exception was repudiated in 1861 in a case that affirmed the vitality of the rule precluding third parties from recovering on contracts. *Tweddle* v. *Atkinson*, 1 B. & S. 393, 121 Eng. Rep. 762 (1861). As one Lord explained in subsequently reaffirming *Tweddle*, "in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it." *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] App. Cas. 847, 853. While plaintiffs occasionally may obtain third party contractual benefits in courts of equity, it remains the rule in England that third party beneficiaries generally have no rights at law. See A. Farnsworth, *supra*, § 10.2 at 713.

[7] While there were narrow exceptions to this rule, virtually all cases recognizing such exceptions involved plaintiffs who either were related to the promisee or who themselves had performed services amounting to consideration. See 2 F. Wharton, *supra*, at 162-63 (discussing seeming exceptions and noting that most can be explained on other grounds than a general right to recovery by unrelated third parties). This accounts for occasional suggestions in

2. This background has obvious relevance here. It has long been established, of course,

> that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Will v. *Michigan Department of State Police*, 491 U.S. 58, 67 (1989), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). And that presumption must be applied with special force when a departure from the common law approach would impose significant obligations or liabilities on the States (see, *e.g.*, *Will*, 491 U.S. at 65-66; *Gregory* v. *Ashcroft*, 59 U.S.L.W. 4714 (U.S. June 20, 1991))—as almost inevitably will be the case if a State's failure to comply with the terms of a spending program is actionable. See generally *Pennhurst*, 451 U.S. at 24-25. Against this background, a Congress that understood rights to be *enforceable* entitlements could not

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the cases that "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, * * * is now the prevailing rule in this country." *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876). In *Hendrick* itself the plaintiff had executed a bond in reliance on a promise by the defendant to another that if the latter secured a bond to delay execution of judgment the defendant would guarantee the issuer against loss. Thus, the plaintiff suing in *Hendrick* had essentially been in privity with the parties to the contract and had provided consideration. *Id.* at 146-148. And, as discussed in text, whatever exceptions existed the treatise writers of the day—including such leading figures as Story and Langdell—uniformly agreed that the general rule was that only those from whom consideration had moved could themselves sue for performance on a contract.

have intended Section 1983 to authorize actions on the part of the third party beneficiaries of spending programs, when such beneficiaries generally were not entitled to seek performance under the common law.

This analysis is not novel; the Court, and individual Justices, have expressed considerable skepticism in the past that spending programs generally create enforceable rights under Section 1983. Noting that the spending provisions there at issue simply regulated the assurances provided by the State to the federal government about the State's use of federal funds, the Court in *Pennhurst* declared it "at least an open question whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." 451 U.S. at 28. And the four dissenting Justices in *Wilder*, explaining that the provision before the Court simply set out one of the requirements for the plan pursuant to which the State would disburse federal funds, concluded that the statute "is addressed to the States and merely establishes one of many conditions for receiving Federal Medicaid funds; the text does not clearly confer any substantive rights on Medicaid services providers." 110 S. Ct. at 2527 (Rehnquist, C.J., O'Connor, Scalia, Kennedy, JJ., dissenting).

Having said this, we recognize that the Court applied the *Golden State* test to hold that the spending provision at issue in *Wilder* created rights within the meaning of Section 1983. But that program differed materially from "a typical funding statute" of the sort at issue here. *Pennhurst*, 451 U.S. at 22. The provision at issue in *Wilder*, the Boren Amendment, 42 U.S.C. § 1396a (a)(13)(A), was part of a federal-state scheme pursuant to which, among other things, hospitals (the plaintiffs in *Wilder*) provided medical services to needy persons;

the federal government offered funds to the States, which in turn agreed to use them to reimburse health care providers "for the medical services provided to needy individuals." *Wilder*, 110 S. Ct. at 2513. See *id.* at 2515-2516. In contrast to Section 671(a)(15) of the AAA, the Boren Amendment thus channeled federal funds directly into the hands of third parties—and did so in return for services rendered by those parties. Viewed in contractual terms, the hospitals provided consideration in the form of medical services. And that is precisely the sort of three-party arrangement in which, at the time of Section 1983's enactment, the third party beneficiary would have been permitted to seek enforcement of the contract's terms. See *National Bank*, 98 U.S. at 124 (stating that one "exception" to the general requirement of privity is "where one person contracts with another to pay money" directly to a third); Hare, *supra*, at 193, 197 (recognizing that the principle permitting one who has offered consideration to sue creates an exception to the general requirement of privity). While the Court's decision in *Wilder* concededly did not advert to the common law background in holding that the Boren Amendment created enforceable rights in the hospitals, the decision's analysis and outcome is wholly consistent with Section 1983's history.[8]

That is not true of the holding below. While the AAA was undoubtedly intended to benefit persons like respondents, they are classic donee beneficiaries; in contrast to the program at issue in *Wilder*, Section 671(a)(15)

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[8] Here, unlike *Wilder*, the statutory provision at issue requires—at most—that money be spent on services that would indirectly benefit respondents. Significantly, respondents conceded below that petitioners have not violated Title IV-B welfare provisions, see *infra* note 10, nor do they allege that DCFS has failed to provide them with food or clothing.

plainly does not require those beneficiaries to provide consideration of the sort that nineteenth century lawmakers would have understood to support the recognition of enforceable rights. Nothing in the language or history of the AAA, moreover, alters that conclusion. To the contrary, the congressional declaration of purpose that is prefixed to section IV-E of the Social Security Act declares that the federal foster care payments authorized by the AAA are made "[f]or the purpose of *enabling* each State to provide, in appropriate cases, foster care * * * and adoption assistance for children." 42 U.S.C. § 670 (emphasis added). And as the authorization section of the Act makes clear, those funds are provided "[f]or the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening child welfare services." 42 U.S.C. § 620. This is language of agreement rather than of rights. Cf. *Pennhurst*, 451 U.S. at 18, 20.

II. SECTION 671(a)(15) DOES NOT CREATE RIGHTS TO THE RECEIPT OF "REASONABLE EFFORTS"

A. Section 671(a)(15) Requires No More Than That States Adopt Individualized Case Plans.

1. For the foregoing reasons, Section 671(a)(15) simply does not create rights that are enforceable under Section 1983. If that conclusion is incorrect, however, the Court still must determine the *nature* of the right established by the statute. The court below simply assumed that the right created by Section 671(a)(15) is an entitlement to the *exercise* of reasonable efforts by state officials. See Pet. App. 10a-12a. But that assumption cannot be reconciled with the language, administrative interpretation, and legislative history of the statute.

Section 671(a) provides in relevant part:

> In order for a State to be eligible for payments under this part, *it shall have a plan approved by the Secretary* which—
>
> * * * *
>
> (15) * * * *provides* that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a) (emphasis added). On its face, the statute requires only that States have individualized plans, approved by the Secretary, that describe the measures they are taking to minimize the need for foster care. Nothing in the statute itself requires that States engage in any specific substantive measures, or that they be required to undertake measures more stringent than those provided in their plans. If Section 671(a)(15) creates any right at all, then, it is to have the State draft a plan that contains the requisite provisions.

Needless to say, the statute should be read according to its plain terms. The Court did just that in *Pennhurst*; interpreting provisions requiring that state recipients of federal funds "provide * * * assurances" that the funds would be used in a particular manner (see 451 U.S. at 12-14), the Court indicated that any right created by the statute would support a claim only "that the state plan has not provided adequate 'assurances' to the Secretary." *Id.* at 28. See *id.* at 33 (opinion of Blackmun, J.) (noting "modest legal content" of assurances requirement). Similarly, the Boren Amendment at issue in *Wilder* requires States to adopt plans for the reimbursement of hospitals according to rates "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate" (42 U.S.C. § 1396a(a)(13)(A)). The four dissenting Justices read the provision to create only a right to the specified findings and assurances (if

it created any rights at all) (see 110 S. Ct. at 2527) (Rehnquist, C.J., dissenting))—even though the language of that statute imposed considerably more stringent requirements on the States than does Section 671(a)(15) of the AAA.

In fact, it is instructive to compare the statute at issue in *Wilder* with the AAA. In rejecting the dissent's analysis, the *Wilder* Court relied entirely on the statutory language requiring States both to find and to make assurances that their rates were reasonable and adequate. See 110 S. Ct. at 2519-2520. The Court focused in particular on the findings requirement, explaining that "the only plausible interpretation of the [Boren] Amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Id.* at 2520 (emphasis in original). The majority accordingly answered the United States' argument that the statute required only the provision of assurances by observing that "[t]his interpretation ignores the language of the statute that requires a State to *find* that its rates are 'reasonable and adequate * * *.'" *Id.* at 2519 n.11 (emphasis in original). Here, in contrast, the assertedly rights-creating provision imposes no such independent obligation on the States; it simply directs the States to "have a plan" that "provides" for the exercise of reasonable efforts.[9]

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[9] The *Wilder* Court also relied extensively on the legislative history of the Boren Amendment (see 110 S. Ct. at 2520-2522), which it found to "demonstrate[] clearly that Congress and the States both understood the Act to grant health care providers enforceable rights" (*id.* at 2522), adding that the legislative history was "replete with indications that Congress intended that States actually adopt rates that are 'reasonable and adequate.'" *Id.* at 2520 n.13. Here, in contrast, the statutory emphasis on state plans is consistent with the legislative history, which emphasizes the congressional intent to encourage state planning. As Senator Cranston, the sponsor of the Act in the Senate, explained with regard to the case plan require-

2. That Section 671(a)(15) creates a right only to adoption of an appropriate plan is confirmed by the construction accorded the statute by the Secretary of Health and Human Services—a construction that was wholly disregarded by the court below.[10] The Secretary's regulations generally require that, to receive federal funds, "a State *must have a state plan* approved by the Secretary that meets the requirements of * * * section 471(a) of the Act [that is, 42 U.S.C. § 671(a)]." 45 C.F.R. § 1356.20(a) (1990) (emphasis added). And "[i]n meeting the 'reasonable efforts' requirements" in particular (45 C.F.R. 1356.21(b)), the regulations require only that the plan "*include a description* of the services offered and the services provided to prevent removal of the child from the home and to reunify the family." 45 C.F.R. § 1356.21(d)(4) (1990) (emphasis added). The regulations thus indicate that no more is required from a state agency under Section 671(a)(15) than that the agency adopt case plans that describe the preventive services provided each child under the State's supervision.

This focus on the plan was a well-considered element of the regulatory structure. Indeed, in December 1980 the Secretary promulgated a set of proposed regulations

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ments incorporated in Section 671, "[t]his provision is intended to *assist* the States in focusing upon the problem of unnecessary long-term foster care and to facilitate a *planning process at the State level* for reducing long-term foster care." 125 Cong. Rec. 22682 (1979) (emphasis added); see also *id.* at 22683 ("Hopefully, these specific requirements will assist in providing the kind of focus for case plans that is missing under current law.").

[10] The court of appeals cited the regulations only once (see Pet. App. 7a n.10), and then only regulations that on their face apply exclusively to Title IV-B of the Act—the provisions of which are not involved here and which respondents below conceded have not been violated. See Plaintiffs' Response to Defendants' Motion to Dismiss, Dist. Ct. R. 60, at 20 n.8 ("[s]ince the class members who are under a protective order do not allege a violation of IV-B, the [HHS IV-B] policy statement is irrelevant.")

that would have imposed extensive, affirmative obligations on the States. See 45 Fed. Reg. 86817 (1980). But the Secretary subsequently withdrew the proposal, explaining that "the Department determined that a less prescriptive approach to implement the statutory requirements was advisable." 48 Fed. Reg. 23104 (1983). As the Secretary concluded, "the proposed regulations contained a number of provisions that, we now believe, would unduly limit State flexibility or impose unjustifiable costs." 47 Fed. Reg. 30934 (1982). Accordingly, "the Department's approach to development of th[e] final rule [was] to give the States *maximum operational flexibility.*" 48 Fed. Reg. 23106 (1983) (emphasis added). Consistent with this approach, the second proposed rule provided "that if a State had a system of preplacement preventive and reunification services as required by section 427(a)(2)(C) and (b)(3) of the Act [42 U.S.C. § 627 (a)(2)(C) and (b)(3)], the requirement for 'reasonable efforts' *would be met.*" 48 Fed. Reg. 23106 (emphasis added); see also 47 Fed. Reg. 30935 (1982) (reiterating that Section 671(a)(15) is satisfied by the existence of a plan describing those services).

In response to criticisms that the new proposal was not specific enough and erred in adopting a statewide rather than individualized focus, the Secretary modified the rule in the least restrictive way—by requiring simply that the required case plans be individualized. See 48 Fed. Reg. 23106-07. As the Secretary explained:

> The Department believes that it is an inappropriate and unnecessary Federal intrusion to dictate nationally a specific set of services which may or may not address a particular State's situation. Moreover, the Department believes that it is *essential* to give States the flexibility and responsibility for these service decisions.
>
> However, we agree with commenters that reasonable efforts must be made on behalf of each child. There-

> fore, the Department has provided in 45 C.F.R. 1356.21(b), that *in order to meet the reasonable efforts requirement*, the State agency must identify, in the child's case plan, those services offered and the services provided to the child * * * to prevent placement * * *. *This is not a new or additional requirement. It is similar to the case plan* requirement in 45 C.F.R. 1356.21(d)(4).

48 Fed. Reg. 23107 (emphasis added). The final rule codified this approach, departing from the proposed one only in specifying that the required case plans be individualized. The regulations thus indicate that no more is required by the reasonable efforts language than that the use of individualized case plans be mandated.[11]

3. The statutory and regulatory language thus seems clear enough. But even if it is ambiguous on the question whether Section 671(a)(15) requires more than the promulgation of an appropriate plan (or compliance with the plan adopted by the State and approved by the Secretary), that ambiguity is fatal to respondents' claim. As this Court stated in *Pennhurst*:

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[11] The fact that Section 671(b) authorizes the *Secretary* to withhold funds from States when "in the administration of the plan there is a substantial failure to comply with the provisions of the plan" is not to the contrary. At most the provision requires States to comply with their plans; it does not permit the Secretary—let alone a federal judge—to demand measures beyond those contained in the plan. Here, of course, the three-day rule imposed by the courts below far exceeds the requirements of the State plan. Moreover, in delegating responsibility to the Secretary to enforce Section 671(a), Congress necessarily delegated to the Secretary the authority to interpret the statute, and the Secretary's duly exercised discretion ought to be accorded great deference. *Chevron U.S.A., Inc.* v. *Nat'l Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Here, the Secretary has determined that Section 671(a)(15) requires only the adoption of individualized plans. And the fact that some of Section 671(a)'s sixteen provisions may require more than the adoption of a plan does not undermine the Secretary's determination that the "reasonable efforts" requirement is not one of them.

> The legitimacy of Congress' power to legislate under the spending power * * * rests on whether the State voluntarily and knowingly accepts the terms of the "contract." * * * Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted). Because the plain meaning of Section 671(a)(15) requires only that case plans be adopted, and because the administrative regulations more than confirm that reading, the Act hardly can be said to tell the States unambiguously that their participation in the AAA program opens them to substantive demands that are actionable in federal court.

B. Section 671(a)(15)'s Reasonable Efforts Requirement Is Too Vague And Amorphous To Be Judicially Enforceable Under Section 1983.

The court of appeals simply disregarded the considerations discussed above, any one of which is enough to warrant reversal. But even if its decision to apply the *Golden State* test and its assumption that Section 671(a)(15) obligates States to *exercise* reasonable efforts were correct, the court nevertheless erred in holding that the "reasonable efforts" requirement is not too vague and amorphous as to be judicially enforceable under Section 1983. See Pet. App. 11a-12a.

This Court repeatedly has reaffirmed the principle that a statute will not give rise to an action under Section 1983 if its language is too "vague and amorphous" for the judiciary to enforce. See *Wilder*, 110 S. Ct. at 2517; *Golden State*, 110 S. Ct. at 448; *Wright*, 479 U.S. at 431-432. In this case, the "reasonable efforts" requirement in Section 671(a)(15) falls within that category for two related reasons. First, judicial review of a state

agency's "efforts" to determine whether they are "reasonable" would require a court to second-guess the agency's basic decisions regarding policy and the allocation of resources. And second, unlike the provisions at issue in *Wilder* and *Wright*, Section 671(a)(15) and its corresponding regulations fail to provide specific guidelines with which to judge whether reasonable efforts have in fact been made.

1. A judicial determination of the reasonableness of a State's efforts inevitably would involve a review of state policy decisions. And because the reasonableness of the actions undertaken by an agency with regard to any one child can be assessed only in light of its spending on other children, review under the "reasonable efforts" provision necessarily would call into question the agency's allocation of resources. That sort of review strains the bounds of judicial competence. As this Court held in a closely analogous context, in determining whether there was sufficiently specific "law to apply" to warrant judicial review of a federal agency's enforcement actions under the Administrative Procedure Act:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce * * * is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.
>
> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, * * * and indeed, whether the agency has enough resources to undertake the action at all. * * * The agency is far better

> equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler v. *Chaney*, 470 U.S. 821, 831-32 (1985) (citations omitted). As the Court therefore concluded, when reviewing an agency's allocation of finite resources there is "no law to apply." *Id.* at 830-31.

It would be incongruous, to say the least, to hold that for purposes of precluding review of enforcement decisions under the Administrative Procedure Act there is "no law to apply," while within the context of a Section 1983 challenge to a state agency's enforcement actions the law is not too "vague and amorphous" to preclude review. Indeed, given the federalism concerns that arise whenever the federal judiciary enjoins state action, federal courts should be less willing to assume oversight of state agencies than of federal ones (or to presume that Congress wished them to do so). Cf. *Board of Education* v. *Dowell*, 111 S. Ct. 630 (1991); *Gregory* v. *Ashcroft*, *supra*.

Here, it is plain that judicial review of a state agency's program to determine whether it satisfies the reasonable efforts provision would require judges to question the policy judgments that enter into the proper allocation of finite resources. As in *Chaney*, agencies implementing the AAA must decide whether resources are best spent on assigning caseworkers to children immediately—a decision that would maximize the number of children assigned to caseworkers, but at the cost of burdening each caseworker with more cases than he or she can effectively handle—or whether in enforcing the Act's provisions agency resources are best utilized by an assignment system that limits the number of children handled by each caseworker. Given that the state resources available to combat the growing societal problem of neglected children represent a zero-sum pie, the resources spent on assigning caseworkers within three days (the solution mandated by the courts below) necessarily must come at the expense

of other vital programs, such as the DCFS's investigative services, as well as at the price of giving sufficient caseworker attention to those children already under assignment.

The court of appeals' decision requiring that all children be assigned caseworkers within three days, therefore, is based on faulty reasoning. The court stated that no efforts cannot amount to "reasonable efforts," and that without assigning a child to a caseworker the agency cannot be making reasonable efforts on behalf of *that child*. Pet. App. 11a-12a. But even assuming that, in the absence of a caseworker, *no* efforts are being made on behalf of the child—a highly disputable assertion—the court of appeals erred by adopting such a narrow focus. Given the number of children in an agency's care, it may well be that providing adequate services to the greatest number of children requires—quite reasonably under the circumstances—that for some period *nothing* be done on behalf of other children. In light of the State's fixed resources, for example, it may well be that, due to a crisis involving one child that requires special attention, an agency might be compelled to leave another child temporarily unassigned for six days. Yet the court of appeals held as a matter of federal law that such a difficult policy decision *never* can be reasonable. Nothing in the statute or its legislative history requires that implausible result.

2. This conclusion is confirmed by comparing Section 671(a)(15) to the provisions at issue in *Wilder* and *Wright*. In *Wilder*, the Boren Amendment specified precisely what duty (a payment) was owed by whom (the State) to whom (hospital providers). The only question left open by the statute was the amount of the required payment. And as to that, the statute provided what the Court termed an "objective benchmark" (110 S. Ct. at 2523): it directed that the rates be adequate "to meet the costs which must be incurred by efficiently and eco-

nomically operated facilities in order to provide care and services in conformity with applicable [safety standards] and to assure that individuals eligible for medical assistance have reasonable access." 42 U.S.C. § 1396a(a)(13)(A). Against this background of statutory specificity, moreover, the relevant regulations set out guidelines to be used in calculating the rates. See 110 S. Ct. at 2522-2523 & n.17. It was these objective guideposts that led the Court to hold the relevant inquiry "well within the competence of the judiciary." *Id.* at 2523.

Similarly, in *Wright* the existence of administrative regulations that "specifically set out guidelines that the [landlords] were to follow in establishing utility allowances" (479 U.S. at 431-32) led the Court to hold that a statute limiting to a "reasonable" amount the utility charge that landlords could include in the rent of low-income tenants was sufficiently specific for purposes of Section 1983. *Id.* Thus, both *Wright* and *Wilder* involved provisions in which the only term left open by the statutes was the amount of payment—a question readily answered by comparison with the objective benchmark of the prevailing market rates.

Here, by contrast, Section 671(a)(15) provides only that States make "reasonable" *efforts* to maintain children in their homes. The statute and its corresponding regulations nowhere state what form those efforts are to take or even who must be the direct recipient of those efforts—the child, the parents, or caseworkers under training. And unlike the case plan and case review requirements of Section 671(a)(16), which the Act specifically defines in great detail in Sections 675(1) and 675(5), the AAA nowhere explains what Congress meant by "reasonable efforts." Indeed, as the administrative history we set out above (at 19-21) makes clear, the reasonable efforts provision is so vague that the Secretary expressly declined even to attempt to specify the precise

duties it imposes. See 48 Fed. Reg. 23106-07; 47 Fed. Reg. 30934-35.

Thus, unlike the provisions at issue in *Wilder* and *Wright*, neither Section 671(a)(15) nor its implementing regulations provide *any* objective criteria with which to measure a State's compliance. Nor do they specify any substantive measures a State must undertake. The only thing clear about Section 671(a)(15) is that it is too vague and amorphous to be judicially enforceable under Section 1983.

3. Finally, the conclusion that Congress did not believe Section 671(a)(15) to create a right that is susceptible to judicial implementation is confirmed by an examination of 42 U.S.C. § 672(a)(1). That provision permits the use of federal funds for foster care maintenance payments in specified circumstances, among them when "the [child's] removal from the home * * * was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and * * * that reasonable efforts of the type described in section 671(a)(15) of this title have been made." Written against the background of state juvenile proceedings, Section 672(a)(1) manifests Congress's intent that state family court determinations as to the exercise of reasonable efforts serve as a prerequisite to the expenditure of federal funds in particular cases. See S. Rep. No. 336, 96th Cong., 2d Sess. 12-16 (1980). Such determinations are made as a matter of course when state authorities separate children from their parents. See Pet. App. 2a. The fiscal purpose of this requirement is clear: Congress sought to ensure that federal funds were not used for foster care payments unnecessarily. See 125 Cong. Rec. 1628-29 (1979) (remarks of Rep. Miller); 125 Cong. Rec. 22686 (1979) (remarks of Sen. Cranston).

Section 672(a)(1) thus indicates that Congress thought it appropriate for specialized state court judges to deter-

mine whether reasonable efforts had been exercised as to particular children. But the contrast between Section 672(a)(1)'s reference to individualized state court judicial determinations and Section 671(a)(15)'s general requirement that state plans include a reasonable efforts provision strongly suggests that the latter provision was not intended to create judicially enforceable rights. In saying this, we do not mean that Section 672(a)(1) precludes recourse to Section 1983 in the usual sense (compare, *e.g.*, *Smith* v. *Robinson*, 468 U.S. 992, 1008-1013 (1984)); instead, the juxtaposition of the provisions, one of which envisions a particular type of judicial determination regarding whether reasonable efforts have been exercised and one of which pointedly does no more than impose a plan requirement, suggests that Section 671(a)(15) does not create rights at all. And while it may or may not be arguable that Section 672(a)(1) creates rights to *individualized* reasonable efforts determinations, that is beside the point here: respondents' class action asserts a generalized right to restructure the state foster care system pursuant to Section 671(a)(15).[12]

The distinction drawn by Congress between individualized and general determinations is a sensible one. The instinct that seems to have motivated the courts below—the feeling that reasonable efforts cannot have been exercised if nothing at all has been done (see Pet. App. 19a)—may have a place when the circumstances of a particular child are before a court. And the use of a judicial determination made in such individualized circumstances as a certification that the child qualifies for federal funds does not threaten federal disruption of the state juvenile system. For the reasons we set out above (at 23-25),

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[12] In fact, there is reason to doubt whether Section 672(a)(1) itself creates rights within the meaning of Section 1983. As we note above, the provision has a fiscal purpose. And the right involved would be one to a state court judicial determination, a peculiar requirement to enforce under Section 1983.

however, it is a different matter altogether to decide whether an entire system, constructed through delicate determinations about the best use of limited resources, provides for the exercise of reasonable efforts. There is no reason to believe that Congress intended federal judges to make such determinations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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